85-675

Supreme Court, U.S.
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CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1985

FOUR MILLION, TWO HUNDRED FIFTY-FIVE THOUSAND, SIX HUNDRED AND TWENTY-FIVE DOLLARS AND THIRTY-NINE CENTS ($4,255,625.39) CONTAINED IN CAPITAL BANK ACCT. #0700003010 (IN THE NAME OF SONAL) INCLUDING ANY ADDITIONAL MONIES CONTAINED IN SAID CAPITAL BANK ACCOUNT; THREE MILLION SIX HUNDRED EIGHTY-SIX THOUSAND, SIX HUNDRED THIRTY-NINE DOLLARS ($3,686,639.00) IN CASH; BENO GHITIS, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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October 10, 1985

QUESTIONS PRESENTED FOR REVIEW

WHETHER SUBSTANTIAL SUMS OF MONEY CAN BE FORFEITED FROM A LEGITIMATE BUSINESSMAN WHO RECEIVED THE MONEY IN A BONA FIDE CURRENCY EXCHANGE WHERE THERE IS *NO* EVIDENCE OF AN IDENTIFIABLE DRUG TRANSACTION OR DRUG TRAFFICKER?

PARTIES TO THE PROCEEDING IN THE COURT BELOW[1]

Beno Ghitis
SONAL
Raymond Takiff
Marie Mam
Mario Matalon
Bruno Teicher
Marcos Fiboim
Malero Trade Corporation
Asnaldo R. Fillo
Fritz Mathias
Emilio Naranjo
Erich Eichenwald
Lilly Lescano
Lucy Arango
Alberto Behar
Francisco Panebianco
Susy Ghitis
Fernando Lenher R.
Zacharias Sahli
Abraham Roitman
Paulette Pinto
Leonor Bigio
Joseph Stroh
Bernard Sander, a/k/a Bernd Sander
Wolfgang Lenis
Senora Gru
Luz Corpus
Freda Wagenberg
Senor Posado

[1]All these parties/claimants are petitioners in this Court.

Senora Dominguez
Diners Club
Julian Alhach
American Express
Master Charge
Senor Eisembald
Senor Ariztizabal
Senora Ariztizabal
Flagship Bank
The Bank of Miami
First Interamericas Bank
Reynaldo Ortiz, Sr.
Olmedo Martin
Sr. Olmedo Martin
Sra. Olmedo (Selva) Martin
Luis A. Ortiz
Y. Nativ
Yaco Srour
Central National Bank
Bank Leumi
Bank of North America
I.L. Maduro
Mario Restrepo
Luis Restrepo
J.D. Restrepo
E. Perez
Senor Landazabel
Frigorifico Popayan
Proim Vulosin
Mustafa Iarba
Jyhdar Merchandise
Gerardo Salazar
Senor Correa
Bernardo Delgado
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Harriet Starusta
Henry Cuartas
Bank of Monaco
Marta Orozco
Emiliano Franco
Senor de Layeras
Ruth de Payeras
Doctor Borrero
Rodrigo Hernandez
Lake Worth Bank
Avia
N. Barona
Gonzalo Guerra
Boston Bank
Visa

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BUSINESS WEEK, April 30, 1984 15

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OPINION BELOW

The opinion of the lower court is reported in *United States v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895 (11th Cir. 1985).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit which affirmed the forfeiture was entered on June 11, 1985, rehearing and rehearing *en banc* denied July 16, 1985.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

21 U.S.C. § 881:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
>
> (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.
>
> (3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value

furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

This petition seeks review of an Eleventh Circuit decision which affirmed a final judgment ordering forfeiture of over $8,000,000 in two consolidated cases.[2] The forfeiture was ordered from an ongoing, legitimate business pursuant to 21 U.S.C. § 881(a)(6) on the grounds that Beno Ghitis, the business' owner, knew the currency was tainted with illegality, although there was no evidence of a substantial connection traceable to drug transactions.[3]

The Eleventh Circuit opinion contains an extensive statement of facts. Beno Ghitis was the primary claimant to the sums of money which the government forfeited. Mr. Ghitis operated Viajes Atlas, a travel agency and money exchange house in Cali, Colombia. In connection with the money exchange business, Viajes Atlas held bank accounts in the United States under the name SONAL. One such account was a checking account at Capital Bank in Miami, Florida. The purpose of this account was to receive deposits of United States dollars from persons who wished to "sell" the dollars to Viajes Atlas in return for checks drawn on the SONAL account for pesos to be delivered by Viajes Atlas in Colombia.[4]

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[2]The amount consists of $4,255,625.39 from a bank account and $3,686,639 in cash.

[3]The district court also ordered forfeiture pursuant to 31 U.S.C. § 1102 though there was no evidence that the currency ever crossed the border. The Eleventh Circuit did not address this issue.

[4]The remaining petitioners in this proceeding were claimants with checks written on the SONAL account which were not paid at the time of the forfeiture.

Substantial cash deposits in small denomination bills were made to the Capital Bank account about two or three times a week by two men. About a month or two after the account was opened, all deposits were made by Victor Eisenstein, an employee of Mr. Ghitis. Mr. Eisenstein received the cash from Colombian couriers, some of whom he did not know.

Within about a year after the account was opened, the United States Customs Service began to investigate the source of the cash deposits made to the SONAL account. They eventually obtained Eisenstein's cooperation. They taped conversations with couriers and watched several substantial cash deposits arrive at Eisenstein's office. Then Eisenstein called Mr. Ghitis, with an agent on the extension, and asked the source of the cash. Ghitis replied that he did not know the source of the money and that Eisenstein should not worry about it.

The government eventually seized over three million dollars in cash from Eisenstein's office and over four million dollars from the bank account.

The Eleventh Circuit listed the facts which it held supported the forfeiture: (1) the money was delivered to Ghitis' office by Colombian couriers, many of whom were unidentified; (2) the couriers did not request receipts and on some occasions refused to accept receipts; (3) on one occasion the couriers delivered the money in a car with a secret compartment (although there is no evidence that Ghitis knew about the car); (4) the money consisted of small and medium denomination bills, and was delivered in various types of boxes and bags; (5) Ghitis' office was unguarded; (6) the sellers of the currency were not on

record with Customs as importers or exporters; (7) the bank charged a high fee to handle Ghitis' account; (8) Ghitis purchased a money counting machine for the bank; and (9) Ghitis requested a loan to protect the account from forfeiture. 762 F.2d at 903.

The Eleventh Circuit concluded that this evidence, together with the large amount of cash involved

> established probable cause to believe that a "substantial connection" existed between the forfeited money and narcotics transactions.

762 F.2d at 903 (footnote omitted).

Conspicuously absent from the record or from the Eleventh Circuit's opinion is any evidence of a single drug transaction or drug trafficker that allegedly generated the money. Although the circumstantial evidence outlined by the panel proves that the currency was handled in a surreptitious manner, it does not prove that the money was drug-generated.

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT DECISION, WHICH UPHELD FORFEITURE OF SUBSTANTIAL SUMS OF MONEY FROM A LEGITIMATE BUSINESSMAN WHO RECEIVED THE MONEY IN A BONA FIDE CURRENCY EXCHANGE, IS UNPRECEDENTED. IT DESTROYS THE STATUS OF CURRENCY AS LEGAL TENDER. IT IS THE FIRST DECISION TO UPHOLD A FORFEITURE WITH *NO* EVIDENCE OF AN IDENTIFIABLE DRUG TRANSACTION OR DRUG TRAFFICKER. THE DECISION, WHICH GREATLY EXPANDS THE SCOPE OF GOVERNMENTAL FORFEITURE, SHOULD BE REVIEWED BY THIS COURT.

The Eleventh Circuit affirmed the district court's finding that the currency and bank account were proceeds "traceable to exchanges for controlled substances", forfeitable under 21 U.S.C. § 881(a)(6).[5] The conclusion that the money should be forfeited pursuant to this

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[5]The statute provides for forfeiture of:

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, *all proceeds traceable to such an exchange*, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter. . . .

statute cannot stand. First, the Eleventh Circuit should not have found that the government proved a "substantial connection" between the monies and an exchange of drugs. A conclusion that the monies were generated by such transactions is pure speculation. The evidence shows that the money came from bona fide currency exchanges. Second, even if the currency was drug-generated earlier in its "lifetime", it was not "proceeds traceable to such an exchange [of drugs]" as required by the statute. Once the dollars were exchanged for pesos, the pesos in the hands of the alleged drug dealer, not the dollars in the hands of the bona fide purchaser, were the proceeds of the controlled substances exchange.

If the government met its burden of proof, Ghitis was required to prove that he did not know about or consent to the controlled substance exchanges five steps removed from his currency exchange. The Eleventh Circuit held that although the district court applied an incorrect legal standard in this issue, it did not matter. It found that Ghitis knew about those exchanges and was not an "innocent owner" within the statute. That simply was not the case. The evidence showed at most that he "should have known". The evidence was insufficient.

(Footnote 5 Continued)

It exempts from forfeiture the property of a person who did not know about or consent to the act which warrants forfeiture:

> [N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

The effect of the Eleventh Circuit's decision is wide-ranging. Currency is legal tender. Legal tender must be accepted in payment of lawful debts. The Eleventh Circuit has destroyed the concept of legal tender by holding that currency is forfeitable if its holder should have known that the currency was part of a drug transaction earlier in its lifetime. It has created a duty on the part of one who receives currency to inquire as to its source. This duty of inquiry is antithetical to the concept of legal tender. Since currency is fungible and is carried throughout the country, this Court should review the unique decision below which impairs the status of currency as legal tender.

a. The government failed to meet its burden of proving a *substantial connection* between the currency and controlled substance exchanges.

As the Eleventh Circuit correctly stated, the government had the initial burden of proving "probable cause for belief that a *substantial connection* exists between the property to be forfeited and the criminal activity defined by the statute, i.e., the exchange of a controlled substance". *United States v. $364,960*, 661 F.2d 319, 323 (5th Cir. 1981). The test for determining probable cause is "reasonable ground for the belief of guilt, supported by less than prima facie proof but more than mere suspicion."[6] *Id.*

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[6]If the government meets its burden, the property's owner may show by a preponderance of the evidence that the money came from a source other than an illegal transaction. *United States v. One 1975 Ford Pickup Truck*, 558 F.2d 755 (5th Cir. 1977); *United States v. (One) 1971 Chevrolet Corvette Auto*, 496 F.2d 210 (5th Cir. 1974).

The government's burden to establish a substantial connection stems from the legislative history of this statute which makes clear that the government must *trace* the connection between the claimed proceeds and the illegal transaction.

> Due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a *substantial connection* between the property and the underlying criminal activity which the statute seeks to prevent. Specifically, the Senate amendment provides for the forfeiture of property exchange [*sic*] or intended to be exchanged in an illegal drug transaction. In addition it provides for forfeiture of property which is the proceeds of an illegal drug transaction *only if there is a traceable connection between such property and the illegal exchange of controlled substances.* Thus if such proceeds were, for example, comingled [*sic*] with other assets, involved in intervening legitimate transactions, or otherwise changed in form, they would still be subject to forfeiture, but *only to the extent that it could be shown that a traceable connection to an illegal transaction in controlled substances existed.* Similarly, any moneys, negotiable instruments, or securities that were used or intended to be used to facilitate any violation of the Controlled Substances Act would be forfeitable only if they had some substantial connection to, or were instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent.

JOINT EXPLANATORY STATEMENT OF TITLES II AND III, 124 CONG.REC. H36,948 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9496, 9522.

Where the government fails to demonstrate probable cause to believe there is a substantial connection between the money claimed for forfeiture and an alleged illegal narcotics transaction, it fails in its burden and the money must be returned to its owner. *See United States v. Wright*, 610 F.2d 930 (D.C. Cir. 1979); *Hudson County Bd. of Chosen Freeholders v. Morales*, 581 F.2d 379 (3d Cir. 1978); *State of New Jersey v. Kaiser*, 476 F.2d 610 (3d Cir. 1973); *United States v. Jenison*, 484 F.Supp. 747 (D.R.I. 1980).[7]

In every reported decision, the evidence showed an identifiable drug transaction, completed or aborted, with which the money was associated, *or* a connection with an identifiable drug transaction participant. *United States v. $64,000*, 722 F.2d 239 (5th Cir. 1984) (money seized matched amounts offered for cocaine sale, including commission); *United States v. $22,287*, 709 F.2d 442 (6th Cir. 1983) (money in apartment with heroin, two scales and firearms, following arrest for heroin sale); *United States v. $2,500*, 689 F.2d 10 (2d Cir. 1982) (money in apartment where defendants arrested on heroin charges; money found with notepad of names and numbers related to drug transactions, cocaine and a scale); *United States v. $83,320*, 682 F.2d 573 (6th Cir. 1982) (money in apartment of known drug dealer who threw large amount of money

[7]These cases were not decided under § 881. However the statutes which were interpreted in these cases are substantially similar to § 881 in that they require a substantial connection between the illegal transaction and the alleged proceeds.

in air when agents entered for search, together with large amounts of heroin and cocaine); *United States v. Eighty-Eight Thousand, Five Hundred Dollars*, 671 F.2d 293 (8th Cir. 1982) (money in shoulder bag which was exhibited to agents to show ability to pay for marijuana); *United States v. $364,960, supra* (money in suitcases in apartment together with cocaine, illegal alien, hashish, pistol, scale and empty plastic baggies containing cocaine traces); *United States v. Certain Real Property Situated at Route 3*, 568 F.Supp. 434 (W.D.Ark. 1983) (claimant unemployed with no source of income other than drug dealing in which he was extensively engaged; drugs found in house); *United States v. $30,800*, 555 F.Supp. 280 (E.D.N.Y. 1983) (money in apartment with cocaine and drug paraphernalia); *United States v. $87,279*, 546 F.Supp. 1120 (S.D.Ga. 1982) (claimant admitted money was proceeds).

Yet the Eleventh Circuit rejected Ghitis' argument that the government had to prove a connection to a particular narcotics transaction or prove the involvement of a drug transaction participant. 762 F.2d at 903-05. The Eleventh Circuit referred to decisions of two other circuits which it claimed upheld forfeitures despite the absence of evidence relating the forfeited property to a particular drug transaction. *Id.* at 904, n.19, *citing United States v. Brock*, 747 F.2d 761 (D.C. Cir. 1984); *United States v. $13,000 in United States Currency*, 733 F.2d 581 (8th Cir. 1984).

The facts of the cases on which the Eleventh Circuit relied, like the facts of the cases cited above, were substantially different from this case because there was evidence of a relation to a drug transaction participant. In *United States v. Brock*, the claimant

was a heroin dealer who had no other source of income for years preceding the seizure. Although there was no connection to a specific transaction, such connection was unnecessary in light of the claimant's occupation.[8] In *United States v. $13,000*, the evidence was similar. It showed that the claimant was traveling to a transaction with narcotics paraphernalia in his bag.

By contrast, the government here did not prove any drug transaction *or* drug participant allegedly involved in generating the money. It failed to prove any connection between the money and these alleged transactions or participants. The panel effectively held, without any supporting evidence, that large amounts of cash handled by Colombians in a surreptitious manner is presumptively drug-generated. Its conclusion that the "great bulk" of the currency involved in this case was "drug-generated" was pure speculation.

Probable cause determinations must be based on "*trustworthy facts* and circumstances", not unsupported speculation. *United States v. Edwards*, 577 F.2d 883, 895 (5th Cir. 1978) (en banc). Here, the "trustworthy facts" are few. The predominant fact the government proved was that Colombian couriers delivered large quantities of cash to Ghitis' office. The government's lead agent admitted, however, that this fact, together with the other facts known to him on August 20 when the currency was moved from SONAL to Customs, did not establish probable cause. The agent was correct. Large quantities of cash, absent drug-related evidence,

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[8]By contrast, Ghitis here proved that his money was generated through a legal and legitimate currency exchange business.

do not prove that the cash was generated by drugs. There is simply no way to know whether the cash was generated legally or illegally and, if generated illegally, that the illegal activity was drug-related.[9]

Despite the agent's admission, the Eleventh Circuit found nine facts from which it concluded that there was a "substanial connection" between the forfeited money and narcotics transactions. 762 F.2d at 903. Those nine facts showed only that there were large amounts of cash delivered by Colombian couriers. But the Eleventh Circuit claimed that the facts showed more; it claimed that it relied on the "totality of the circumstances":

> Ghitis argues that, if we uphold the district court's finding of probable cause, any large amounts of cash held by Latins in Miami automatically will be subject to forfeiture under 21 U.S.C. § 881(a)(6). We see little resemblance, however, between the various scenarios described by Ghitis and the instant case. We emphasize that, here, it is the totality of the circumstances, and not merely the nationality

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[9]The government introduced no evidence to show that currency transactions of the size involved in this case are likely to be "drug-tainted". Nor can a court take judicial notice of any such "fact". A recent article, for example, states that $2 to $3 *billion* a year of non-drug related "flight capital" is brought into the United States each year from South America. BUSINESS WEEK, April 30, 1984 at 138. Most of it is probably brought out of those South American countries surreptitiously, in violation of currency export laws like those of Colombia. There is simply no way to ascertain whether the currency involved in this case is "drug-tainted" absent evidence of a drug nexus.

of the couriers or the amount of money involved, that gives rise to the finding of probable cause.

762 F.2d at 903, n.18.

The Eleventh Circuit's conclusion is simply not a realistic assessment of the circumstances. Its holding leads to the unacceptable conclusion that large cash transactions are presumed to be "drug-tainted". Consider the following scenarios which the Eleventh Circuit found distinguishable, but which merit serious consideration.

1. A young Latin male walks into a Mercedes dealer in Miami and buys a car for $40,000 cash. He has no permanent address and no readily ascertainable means of support. Can the government forfeit the $40,000 in the hands of the Mercedes dealer absent evidence that the currency is "drug-tainted"? If the allegedly "unusual" currency transactions involved in this case, without more, support the conclusion that the currency was "drug-tainted", then the same must be said of the dealer's cash.[10]

2. A Latin businessman purchases a $500,000 house for cash. Can the government forfeit the $500,000 in the hands of the innocent seller? Is the size of the cash transaction, without more, sufficient to establish probable cause of a "drug taint", thereby placing the burden on

[10]Nor will the Mercedes dealer qualify as an "innocent owner". If the cash purchase of the car is evidence that the cash is "drug-tainted" then, under the standard adopted by the court here, the Mercedes dealer "should have known" of the taint and is not an innocent owner.

the innocent seller to prove whether the Latin businessman's money was "drug proceeds" or "flight capital"? How can the innocent seller ever prove the source of the Latin businessman's money? Must the seller investigate whether the businessman's *customers* are "drug-related" before selling his house for cash?

3. "Alberto", a Latin male, walks into a bank with a suitcase containing $1,000,000 in cash and exchanges it for a cashier's check. Does this unusual, large cash transaction establish probable cause to believe that the cash was "drug-tainted", making the cash forfeitable in the hands of the bank and placing the burden on it to show where the cash was generated?

The government's own witness admitted that large cash deposits were not unusual or unique. (T. 598). The lead government agent agreed when he determined that the facts known to him on August 20, including the large cash deliveries, did not provide probable cause to believe that the money was drug-tainted. (T. 312).

In *United States v. $364,960, supra*, the Eleventh Circuit recognized that currency may be forfeited when found in close proximity to drug-traffickers and drug transactions:

> Two illegal aliens from Colombia, a country where large amounts of the narcotics that enter the United States originate, were apprehended in an apartment in which they claimed no interest, *with narcotics, narcotics paraphernalia,* guns, and the $364,960.00. From the sheer quantity of currency seized *under these*

> *circumstances*, a court may permissibly infer a connection with illegal narcotics trafficking.

Id. at 324 (emphasis added). By its decision in this case, the Eleventh Circuit effectively rewrote the last sentence quoted above.

> If the quantity of currency is large enough, a court may permissibly infer a connection with illegal narcotics trafficking *absent any other special circumstances.*

This conclusion cannot be supported. It is unsupported by the statute's explicit language. It is unsupported by the legislative history. It is unsupported by any case arising under the statute. For the reasons stated, this broad expansion of the government's forfeiture power should be explored by this Court.

Even if the government met its burden of proving probable cause, Ghitis more than adequately rebutted the government's showing. The preponderance of the evidence in the record shows that the money came from legitimate sources. *United States v. $131,602*, 563 F.Supp. 921, 923 (S.D.N.Y. 1982) (government proved claimants offered to purchase drugs for $100,000; claimants then presented evidence that they received $80,000 from the sale of a discotheque and that one of them brought $20,000 into the country before the transaction in question; $100,000 forfeitable because it was "intended to be furnished . . . in exchange for a controlled substance", but evidence insufficient to prove remaining currency was drug-tainted).

The evidence in this case of a legitimate source of funds was more than adequate. The bulk of the dollars Ghitis received in exchange transactions came from Carlos Molina. The trial court expressly found that Molina was "a Colombian money exchanger residing and doing business in Colombia." It found that SONAL, one of the largest exchange houses in Colombia, and Molina, another exchange house, were "ostensibly legitimate institutions" and "reasonably reputable" exchange houses. If SONAL or Ghitis received dollars from Molina and Molina had a valid money exchange business, then there was a legitimate source for the money. It was not Ghitis' burden to prove the source of Molina's customers' currency, and then the source's source, ad infinitum.

The Eleventh Circuit rejected that argument. It held: "That Ghitis may not have received the money *directly* from drug dealers does *not* prove that the money was free from a substantial drug connection." 762 F.2d at 904, n.22. But such a burden is impossible.[11] One can never prove a specific piece of currency was never owned by a drug dealer earlier in its "lifetime". The only issue should be whether the claimant received the currency from a legitimate source. Once that is proven, as the Eleventh Circuit admitted it was here, the court must find that possession of the money does not violate the statute.

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[11]Consider the Latin businessman who purchased the $500,000 house for cash. The house's seller might be able to verify that the businessman has a legitimate business which provided a source for the cash. But can the seller ever prove the source of that business' customers' money? That is precisely what the court held Ghitis was required to do in this case.

In sum, the government did not meet its burden of demonstrating probable cause of a substantial connection between the currency and an illegal drug transaction. The only evidence showed a legitimate source for the money. Money is fungible. It is legal tender. A decision which imposes on a businessman the obligation to question the origin of money which is used in a legal transaction is antithetical to the very concept of legal tender.[12] *Compare Julliard v. Greenman (Legal Tender Cases)*, 110 U.S. 421 (1884) (currency is legal tender and must be accepted as payment). The Eleventh Circuit's conclusion that the government met its burden of proving a substantial connection to a drug transaction should be reviewed and reversed.

b. The currency and bank account, which Ghitis received in commercial currency exchanges, are not "proceeds" subject to forfeiture under the statute.

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[12]This is precisely the result reached with respect to negotiable instruments. A purchaser of such instruments has no duty to inquire as to whether the instrument is tainted:

> To impose upon one who is offered commercial paper the duty of inquiring in each instance whether [the] obligations [are subject to any defenses] would so burden such transactions as to create insuperable impediments to the free exchange of negotiable paper, an indispensable part of modern business.

Jaeger and Branch, Inc. v. Pappas, 20 Utah 2d 100, 433 P.2d 605, 607-608 (1967). *See also Hartford Nat'l Bank & Trust Co. v. Credenza*, 177 A. 132 (Conn. 1935) ("No duty rests upon the purchaser [of negotiable instruments] to make inquiry as to the purpose for which the paper was given"); *Salitan v. Carter, Ealey and Dinwiddie*, 332 S.W.2d 11 (Mo.Ct.App. 1960) ("A bona fide holder for value

21 U.S.C. § 881(a)(6) contains an explicit tracing provision which states that "all *proceeds* traceable to such an exchange [of controlled substances]" are forfeitable. The simple answer to the examples posited above is that the currency in the hands of the Mercedes dealer, the house seller or the bank are not "proceeds" subject to forfeiture under the statute. When a person receives currency from an alleged drug dealer in a commercial transaction and gives the dealer full value, i.e., the Mercedes, the house, or the cashier's check, those items in the hands of the drug dealer are the proceeds of the drug transaction, not the dollars in the hands of the person who engaged in the commercial

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(Footnote 12 Continued)
who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration. . . . The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass merchantile transactions to expose the trade to the consequences of having the bill or note passed to him impeached for some covert defect").

The same result should be reached with respect to legal tender since negotiable instruments are merely a substitute for legal tender:

> Negotiable instruments are contrived to circulate as substitutes for money, as a medium of exchange, *without the burden of inquiry;* and the statutory rights of a holder in due course are of the very essence of this policy. The integrity of commercial paper should not be left to implication and the attendant uncertainty.

Modern Indus. Bank v. Taub, 47 A.2d 348, 351 (N.J.App. 1946). The Eleventh Circuit decision, which places this burden on a holder in due course of currency, should be rejected.

transaction. Here, the pesos in the hands of the alleged drug wholesaler, not the dollars in Ghitis' hands, are the proceeds.

The term "proceeds" must be given its ordinary, common sense meaning. *Russello v. United States*, 104 S.Ct. 296, 299 (1983) (where Congress does not define statutory term, court looks to "ordinary meaning of the words"). It means "money or articles or other thing of value arising or obtained by the sale of property". Black's Law Dictionary at 1369 (4th ed. 1968). *See, e.g., Furst & Thomas v. Elliot*, 56 P.2d 1064 (Idaho 1936); *Ladd v. Upham*, 53 S.W.2d 1037 (Tex.Ct.App. 1933). When the drugs are sold and currency is used to buy a car or house, or is exchanged for pesos, the car, house and pesos are then the "proceeds" of the drug transaction. As Black's Dictionary states at 1369:

> Thus, goods purchased with money arising from the sale of other goods, or obtained on their credit, are proceeds of such goods.

When drug-generated currency is used by the drug dealer to buy a car, this definition translates to the following:

> Thus, a car purchased with money arising from the sale of drugs is proceeds of such drugs.

Where, as here, the allegedly drug-generated currency is used to buy pesos, the pesos, not the currency, are the "proceeds":

> Thus, pesos purchased with money arising from the sale of drugs are proceeds of such drugs.

Ghitis posed to the Eleventh Circuit that this would lead to nonsensical results. The court rejected Ghitis' analysis. 762 F.2d at 905.

> A drug dealer has a drug-generated $100 bill. He asks a cohort to exchange the $100 bill for five $20 bills. According to the government's argument, both the $100 bill in the cohort's hands and the five $20 bills in the dealer's hands are "proceeds" subject to forfeiture. Although only $100 was drug-generated, $200 are now forfeitable. If the cohort goes to a second cohort and changes the $100 bill for ten $10 bills, $300 is now forfeitable—the five $20 bills in the dealer's hands, the ten $10 bills in the first cohort's hands, and the $100 bill in the second cohort's hands.

But the answer to all this, using ordinary, common sense definitions, is that the "proceeds" are what the drug dealer gets back from the bona fide transaction, not the fungible dollars in the hands of the person who gave full value for those dollars. Here, the Eleventh Circuit confirmed the district court's conclusion, without evidentiary support, that the drug wholesaler sold drug dollars to Molina for pesos and that Molina then sold these dollars to Ghitis for pesos. The pesos in the hands of the drug wholesaler, not the dollars in Ghitis' hands, are the forfeitable "proceeds" of drug transactions.[13]

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[13]This result comports with this Court's admonition:

> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty

Once again, the Eleventh Circuit's unparalleled expansion of the forfeiture statute should be explored by this Court.

If correct, the Eleventh Circuit's analysis of this case compels the conclusion that persons, at least Colombians, engaged in commercial transactions involving large quantities of currency can *never* be innocent owners within the meaning of the statute. First, the government meets its initial burden of proof by showing that large quantities of cash were involved in the transaction. This creates an inference that the large quantities of cash were drug-generated. The burden then shifts to the claimant to show that he did not know that the cash was "drug-generated". But since, according to the panel, the handling of large quantities of cash creates an inference that they were drug-generated, the claimant necessarily "should have known" of that "fact". Burdened with that inference, the claimant can never win.

During the course of his testimony, Ghitis testified:

> If you are Colombian and you have money, you are a criminal in the United States.

(T. 1258). If the government succeeds in taking over $8,000,000 from Ghitis and his business, a legitimate currency exchange, based only on the meager evidence in this record, then he is right.

(Footnote 13 Continued)

> only upon those who are significantly involved in a criminal enterprise.

United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971).

CONCLUSION

For these reasons, Petitioners respectfully request the Court to issue its writ of certiorari and review the judgment, opinion and order on rehearing of the Eleventh Circuit.

Respectfully submitted,

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Attorneys of Record
For Petitioners

October 10, 1985

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-5026

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FOUR MILLION, TWO HUNDRED FIFTY-FIVE THOUSAND, etc., et al.,
Defendants-Appellants

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THREE MILLION, SIX HUNDRED EIGHTY-SIX THOUSAND, etc., et al.,
Defendants-Appellants.

June 11, 1985

Rehearing and Rehearing En Banc Denied July 16, 1985

Appeal from the United States District Court
for the Southern District of Florida

Before HILL, KRAVITCH and SMITH*, Circuit Judges:

KRAVITCH, Circuit Judge:

This appeal involves two civil forfeiture cases, consolidated in the court below, arising under 21 U.S.C. § 881(a)(6),[1] which applies to the proceeds of narcotics transactions, and 31 U.S.C. § 5317,[2] which applies to

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*Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

[1]21 U.S.C. § 881(a)(6) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

[2]31 U.S.C. § 5317, formerly codified as 31 U.S.C. § 1102, provides, in pertinent part:

(b) A monetary instrument being transported may be seized and forfeited to the United States Government when a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement.

currency transported across the borders of the United States without the filing of a required report. Acting pursuant to these two statutes, the district court ordered the forfeiture to the United States of $4,255,625.39 in currency and $3,686,639 in funds on deposit in a bank account. 551 F.Supp. 314. Claimant Beno Ghitis, whose company, Viajes Atlas, owned both the currency and the bank account, appeals from the district court's judgment, asserting that 21 U.S.C. § 881(a)(6) is inapplicable because (1) the government failed to prove a "substantial connection" between the forfeited money and narcotics transactions, (2) the money did not constitute the "proceeds" of such transactions, and (3) Ghitis had no knowledge of such transactions. Ghitis also claims that 31 U.S.C. § 5317 does not apply because (1) the forfeited money did not cross the United States border, (2) the money was not "in the process of transportation" when it was seized, (3) the funds on deposit in the bank account did not constitute a "monetary instrument," and (4) there was no evidence that whoever may have transported the money knowingly failed to file the required reports. Numerous additional claimants holding checks written on the forfeited bank account appeal from the district court's entry of summary judgment against them.

We hold that both the currency and the funds in the bank account were forfeitable under 21 U.S.C. § 881(a)(6). The government demonstrated a "substantial

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(Footnote 2 Continued)

31 U.S.C. § 5316, formerly codified as 31 U.S.C. § 1101, requires the filing of a report whenever a person transports monetary instruments totalling more than $5,000 at one time into or out of the United States.

connection" between the forfeited money and narcotics transactions, the money constituted the "proceeds" of such transactions, and Ghitis failed to prove that he lacked knowledge of such transactions. In view of these conclusions, we need not address Ghitis' arguments concerning the applicability of 31 U.S.C. § 5317. Finally, we hold that the district court did not err in entering summary judgment against those persons holding checks written on the forfeited bank account. We thus affirm the judgment of the court below ordering forfeiture of both the currency and the funds in the bank account to the United States.

I. FACTS

Claimant Beno Ghitis, a citizen of Cali, Colombia, operated a travel agency and money exchange house known as Viajes Atlas. In connection with its money exchange business, Viajes Atlas held bank accounts in the United States under the name of SONAL. One such bank account was a checking account, opened in March, 1980, at the Capital Bank in Miami, Florida. The signatories on this checking account were Beno Ghitis and his parents, Altar and Sonia Ghitis. Capital Bank initially charged a service fee for the SONAL account in the amount of one-eighth of one percent of the total deposits made to the account each month.

The alleged purpose of the SONAL account was to receive deposits of United States dollars from persons who wished to "sell" the dollars to Viajes Atlas, in return for checks drawn on the SONAL account or pesos to be delivered by Viajes Atlas in Colombia. About one week after the account was opened, the bank began receiving large cash deposits to the account.

The deposits ranged from $500,000 to $1,000,000, mostly in small denomination bills, and were delivered to Capital Bank's downtown Miami branch by two men identified only as "Guillermo" and "Jaime." Such deposits initially were made once a week, but soon increased in frequency to two or three times a week.

In April or May, 1980, Victor Eisenstein, an employee of Beno Ghitis, introduced himself to Capital Bank branch manager Armondo Pozo as the person who would henceforth make all deposits to the SONAL account. About two weeks later, Pozo notified Eisenstein that the bank no longer would be able to accept cash deposits to the SONAL account because the bank's bonding company refused to insure any cash in the bank in excess of $1,000,000. Eisenstein informed Ghitis of the bank's decision, and Ghitis met with Pozo. Ghitis told Pozo that he was not in the drug business, but that perhaps he was dealing with people who were, unbeknownst to him, involved in the drug business. Pozo explained that he could not change the bank's policy concerning the large cash deposits, and suggested that Ghitis discuss the matter with bank president Abel Holtz.

After meeting with Ghitis, Holtz agreed, on behalf of the bank, to continue accepting the cash deposits, on the condition that the service fee for the SONAL account be increased to one-half of one percent of the total amount deposited in the account each month. Ghitis also consented to purchase a money-counting machine for use by the bank in counting the SONAL deposits. Eisenstein thereupon resumed making deposits to the account, delivering between $1,000,000 and $2,000,000 to the bank two or three times a week.

These large amounts of cash were handled in a manner that was unusual, to say the least. The cash was delivered to Eisenstein's office[3] by Colombian couriers, some of whom were unknown to Eisenstein. The couriers did not request, and on at least several occasions refused to accept, receipts for the cash, which consisted mostly of small and medium denomination bills. The cash was delivered to Eisenstein, and subsequently was transferred to the bank, in suitcases, cardboard boxes, duffel bags, and flight bags. Eisenstein's office was not guarded, had no security devices or special locks, and was not equipped with a safe or vault, despite the fact that large sums of cash were left in the office, sometimes overnight.

In early 1981, Eisenstein became concerned about the source of the cash he was receiving for deposit in the SONAL account. In an effort to assuage Eisenstein's concerns, Ghitis sent Eisenstein a letter, dated March 7, 1981, from Cali, Colombia. In the letter, Ghitis stated: "The monies received by us in the U.S. are in connection with exchange transactions from (as far as we know) the exporting and importing of agricultural products, raw materials, etc., sales commissions and other categories, received abroad by private individuals who are primarily from our country." SONAL's records, however, show that the dollars deposited in the SONAL account were "sold" to Viajes Atlas by Colombian citizens,

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[3]Sometime in July or August, 1980, the bank directed that Eisenstein make the cash deposits at the bank's main office at North Bay Village, where security apparently was tighter. Shortly thereafter, Eisenstein occupied an office, under the name "American Overseas Enterprises," on the fourth floor of the same building in which the bank's North Bay Village office was located.

none of whom maintained offices in Florida, none of whom were licensed, incorporated, or registered to do business in Florida, and none of whom were noted in records maintained by the United States Customs Service as having imported or exported materials into or out of the United States. Ghitis also wrote to Eisenstein: "Even though some of these transactions involved the handling of cash, they do not give rise to mistaken associations with illegal operations which are so fashionable these days in Florida." After receiving Ghitis' letter, Eisenstein, in an apparent effort to "protect" himself, drafted and mailed to himself a letter of resignation.

Meanwhile, in February, 1981, Ghitis again met with Pozo, who by then had become vice-president of the bank. Ghitis asked Pozo if the government could come in and seize the money in the SONAL account. When Pozo said that such a seizure was possible, Ghitis asked whether the bank would be willing to make SONAL a loan to cover the funds on deposit in the account and thereby prevent a forfeiture.[4] Pozo replied that such a loan was out of the question. Ghitis' request for a loan was referred to Abel Holtz, who found the request "unusual for banking" and denied it. Ghitis also asked Holtz to set up a meeting between Ghitis and government agents, but did not contact or attempt to contact any government agents himself.

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[4]Ghitis apparently intended to replace the funds on deposit in the SONAL account with the proceeds of the bank loan, thus giving the bank priority over the funds in the account and potentially preventing forfeiture of the funds to the government.

By August, 1981, the United States Customs Service had begun to investigate the source of the cash deposits being made to the SONAL account. Eisenstein agreed to cooperate with the Customs Service investigation, allowing Customs agents to have access to his office and to monitor telephone conversations between him and Ghitis, and providing the agents with identification of those couriers who were known to Eisenstein. Eisenstein also turned over to a Customs agent his still-sealed letter of resignation.

Sometime in August, Ghitis and Abel Holtz discussed the large amounts of cash regularly being deposited in the SONAL account. Holtz expressed concern over the bank's "exposure" under such circumstances. Ghitis denied any drug connections, but again voiced his suspicion that the money he was receiving might have some involvement with drug transactions.[5] Ghitis subsequently advised Eisenstein, and Eisenstein notified Customs agents, that Ghitis would come to the United States to discuss the SONAL account if he received assurances that he would not be arrested. The Customs agents replied, however, that they could not give such assurances.

On August 19, Customs agents set up surveillance at Eisenstein's office. Eisenstein consented to the placement of a tape recorder in his leather pouch, and allowed Agent Fernandez to be present in the office to observe the deliveries of cash for deposit in the SONAL

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[5]After this conversation with Ghitis, Holtz increased the service fee for the SONAL account to a flat fee of $300,000 per month, payable twice monthly. The flat fee was made retroactive to May 1, 1981.

account. Around noon, Alberto Rodriguez,[6] a courier for Carlos Molina, a Colombian businessman and money exchanger, arrived at Eisenstein's office. Upon Rodriguez' arrival, Fernandez left the office and waited in a coffee shop downstairs. A short while later, Eisenstein and Rodriguez met Fernandez at the coffee shop and asked him to help unload some packages. The three men walked to a nearby parking lot, where Rodriguez pointed to a maroon 1981 Chevrolet Caprice with a Florida license plate.[7] Rodriguez handed a set of keys to Eisenstein, said, "That's the car," and walked away. Eisenstein and Fernandez opened the trunk of the car, removed three cardboard boxes and one brown package, and carried them up to Eisenstein's office. Eisenstein and Fernandez then returned downstairs, where they were met by Rodriguez. Rodriguez took the keys back from Eisenstein and drove off in the Caprice.

Eisenstein later told Fernandez that he had asked Rodriguez to produce identification, and that Rodriguez had done so reluctantly. Eisenstein also related that Rodriguez had said that the boxes contained $2,717,789 in cash. Late in the afternoon on August 19, Eisenstein deposited $1,313,000 of the cash from the boxes, along with $844,000 in cash that had been delivered the day before by Brigitte Edelman, in the SONAL account.

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[6]Customs agents later obtained, from the Florida Department of Highway Safety and Motor Vehicles, a copy of a Florida driver's license bearing Rodriguez' picture and the name, "Carlos Alberto Torro." The address on the driver's license was an empty warehouse in Miami.

[7]The vehicle registration for the maroon Caprice contained the name, "Carlos Alberto Torro," and the address of an empty warehouse. *See supra* note 6.

The remainder of the cash was left in the office. At about 4:30 p.m., Eisenstein, Fernandez, and Ghitis engaged in a three-way telephone conversation, during which Ghitis again said that he wanted to talk to the government agents, but that he would not do so without a promise of immunity. Fernandez replied that he could not grant immunity to Ghitis, but that he did not know of any arrest warrants against Ghitis.[8]

The next day, August 20, Fernandez observed Rodriguez, accompanied by another man later identified as Hector Gomez,[9] arrive at Eisenstein's office in the maroon Caprice. Rodriguez entered the building, while Gomez walked to a location about 50 to 75 yards away and watched the car. Eisenstein and Rodriguez soon emerged from the building, removed two large cardboard boxes from the trunk of the car, and took the boxes inside. Rodriguez and Gomez then left in the Caprice. Eisenstein later told Fernandez that, according to Rodriguez, the two boxes contained $2,000,000. Other deliveries were made the same day by a man identified only as "Mono," who delivered $200,000, and by Doria Rospenia, who delivered $10,000.

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[8]After the events relevant to this case occurred, Ghitis and Eisenstein were indicted and convicted by a jury on charges of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and felonious failure to file currency transaction reports with the Internal Revenue Service, in violation of 31 U.S.C. §§ 1059, 1081, and 1082 (now codified at 31 U.S.C. §§ 5322, 5313). Their convictions were reversed by this court on appeal. *See United States v. Eisenstein*, 731 F.2d 1540 (11th Cir.1984).

[9]Customs agents later discovered that a Florida driver's license issued to Gomez contained a Miami address that did not exist.

At about 6 p.m. on August 20, Eisenstein spoke with Beno Ghitis by telephone, while Fernandez listened on an extension. Eisenstein asked Ghitis where all of the cash was coming from. Ghitis replied that he didn't know where the cash was coming from, that Eisenstein shouldn't worry about it, but that he should not deposit any more cash in the SONAL account. Ghitis also told Eisenstein that Rodriguez knew that Eisenstein "had been with Customs." Eisenstein became visibly upset at this remark.

Meanwhile, Customs agents had been following the maroon Caprice utilized by Rodriguez and Gomez. On August 19, after delivering the cash to Eisenstein's office, Rodriguez drove to a ticket agency where he purchased a one-way ticket on Avianca Airlines flight 65, bound from Miami to Colombia, on September 2, 1981.[10] In the evening of August 20, Gomez drove to Miami Beach, where he parked the car in a no-parking zone, got out, looked around, and briskly walked away. Several days later, the car was towed by Miami Beach police to a local "pound." A search of the car revealed a secret compartment, operated by a hidden latch, behind the rear seat. In the glove compartment of the car, the police found two Avianca Airlines tickets for one-way

[10]Rodriguez used the name, "Carlos Alberto Torro," and paid for the ticket with 300 one-dollar bills. The ticket never was used.

flights from Miami to Medellin, Colombia, on August 29, 1981.[11] The car never was claimed by either Rodriguez or Gomez.[12]

At about 7:00 p.m. on August 20, Customs agents, with Eisenstein's permission, removed from Eisenstein's office for inspection $3,686,639 in cash, some of which had been left unguarded in the office since the day before, and several discarded boxes and bags. Later that night, the agents told Eisenstein that they were going to seize the cash.[13] The next day, August 21, the agents obtained from a federal magistrate a warrant for the seizure of the funds on deposit in the SONAL account. Upon service of the warrant, Capital Bank

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[11]The two tickets were issued to Hector Gomez and "Gilberto Rua." The tickets never were used.

[12]For purposes of this appeal, we are concerned only with the ultimate determination whether the money was forfeitable under 21 U.S.C. § 881(a)(6). Hence, although the impoundment and search of the maroon Caprice took place after the initial seizure of the money by the Customs agents on August 21, we may consider such evidence in evaluating the decision of the court below.

The government attempted to establish at trial that narcotics detection dogs "alerted" to the scent of narcotics emanating from the secret compartment in the car. The district court, however, rejected such testimony as "interesting and innovative but unconvincing."

[13]The agents made the decision to seize the cash after narcotics detection dogs "alerted" to the scent of narcotics emanating from the boxes containing the cash. The district court, however, declined to give weight to the government's testimony concerning the narcotics scent. *See supra* note 12.

issued to the government a cashier's check in the amount of $4,255,625.39.

Subsequent inspection of SONAL's records showed that, between January 1 and August 21, 1981, a period of less than eight months, deposits of cash to the SONAL account by Eisenstein totalled $242,238,739. Of this amount $191,000,000 was delivered to Eisenstein by Alberto Rodriguez acting on behalf of Carlos Molina. On August 19 and 20, Eisenstein received $7,012,799 in small and medium denomination bills for deposit in the SONAL account. Of this amount, $4,781,799 was delivered by Rodriguez and Hector Gomez.

II. DISCUSSION

A. Did a "Substantial Connection" Exist Between the Forfeited Money and Narcotics Transactions?

Ghitis first argues that the government failed to prove a "substantial connection" between the forfeited money and narcotics transactions,[14] and that the district

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[14]The "substantial connection" requirement appears not in the statute itself, but in the legislative history:

> Due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a *substantial connection* between the property and the underlying criminal activity which the statute seeks to prevent. . . . Similarly, any moneys, negotiable instruments, or securities that were used or intended to be used to facilitate any violation of the Controlled Substances Act would be forfeitable only if they

court thus erred in entering judgment for the government. The problem with Ghitis' argument, however, is that the government need not prove such a connection. Rather, in forfeiture actions under 21 U.S.C. § 881(a)(6), the government merely must demonstrate the existence of "*probable cause for belief* that a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute," that is, the exchange of a controlled substance. *United States v. $364,960 in United States Currency*, 661 F.2d 319, 323 (5th Cir.Unit B 1981) (emphasis added).[15] "Probable cause" refers to "reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." *Id.*; *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir.1980).[16] In our view, the Government adequately met its burden.[17]

(Footnote 14 Continued)

> had some *substantial connection* to, or were instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent.

Joint Explanatory Statement of Titles II and III of the Psychotropic Substances Act of 1978, Pub.L. No. 95-633, 92 Stat. 3768 (codified in scattered sections of 18 and 21 U.S.C.), *reprinted in*, 1978 U.S. Code Cong. & Ad.News 9496, 9518, 9522 (emphasis added).

[15]Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in this circuit. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

[16]The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[17]In this circuit, the existence of probable cause to support a forfeiture is a matter of law, and thus subject to plenary review

The evidence at trial revealed that the forfeited currency and funds on deposit were part of a huge amount of money routed through the SONAL account between March, 1980, and August, 1981. The totality of the circumstances surrounding the deposits to the SONAL account leads us to conclude that the money probably was drug-generated. We find particularly significant the evidence indicating that (1) the money was delivered to the office of SONAL's agent, Eisenstein, by Colombian couriers, many of whom were unidentified, (2) the couriers did not request, and on at least several occasions refused to accept, receipts for the cash, (3) on at least one occasion, the couriers delivered the cash in the trunk of a car equipped with a secret compartment, and, when followed, abandoned the car, (4) the cash consisted of small and medium denomination bills, and was delivered in suitcases, cardboard boxes, duffel bags, and flight bags, (5) Eisenstein's office was unguarded and devoid of security devices, (6) the alleged "sellers" of the cash were not on record with the United States Customs Service as exporters or importers, (7) the bank charged an unusually high service fee for the SONAL account, (8) Ghitis consented to purchase a money-counting machine for the bank's use in counting the deposits to the SONAL account, and (9) Ghitis requested an "unusual" loan to protect the funds on deposit in the SONAL account from forfeiture. This evidence, coupled with the sheer amount of money involved, namely, over $242,000,000 during a period of less than eight months, established probable cause to believe that a "substantial connection"

(Footnote 17 Continued)

on appeal. *See United States v. $364,960 in United States Currency*, 661 F.2d 319, 323 & n.12 (5th Cir.Unit B 1981).

existed between the forfeited money and narcotics transactions.[18]

Ghitis alleges that the government's evidence was circumstantial, not direct, and that the government failed to produce evidence of a connection with a particular narcotics transaction. Both of these claims are irrelevant. This court's predecessor has held that, in a forfeiture action under 21 U.S.C. § 881(a)(6), circumstantial evidence can suffice to support a finding of probable cause. *See United States v. $364,960 in United States Currency*, 661 F.2d at 324-25. Furthermore, nothing in the statute requires evidence of a particular narcotics transaction, and we decline to impose such a requirement here.[19]

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[18]Ghitis argues that, if we uphold the district court's finding of probable cause, any large amounts of cash held by Latins in Miami automatically will be subject to forfeiture under 21 U.S.C. § 881(a)(6). We see little resemblance, however, between the various scenarios described by Ghitis and the instant case. We emphasize that, here, it is the totality of the circumstances, and not merely the nationality of the couriers or the amount of money involved, that gives rise to the finding of probable cause.

[19]At least two other circuits have upheld forfeitures under 21 U.S.C. § 881 despite the absence of evidence relating the forfeited property to a particular drug transaction. In *United States v. Brock*, 747 F.2d 761 (D.C.Cir.1984), the forfeited property consisted of jewelry found in the attic of a house. Drugs, money, a gun, and narcotics equipment were found in a different room of the same house. The D.C. Circuit noted that "[t]here was no direct evidence to connect the jewelry with the claimant's alleged narcotics activities." *Id.* at 762. The court nevertheless affirmed the judgment of forfeiture, explaining that "[c]ircumstantial evidence and inferences therefrom are good grounds for a finding of probable cause in a forfeiture proceeding." *Id.* at 763.

Ghitis also contends that the district court erred when it took into account, as a "common experience consideration," the fact that Miami has become a center for drug-smuggling and money-laundering. Such observations, however, were not improper. As this court recently has emphasized in another context, probable cause "must be judged not with clinical detachment but with a common sense view to the realities of normal life." *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir.1985); *United States v. Herzbrun*, 723 F.2d 773, 775 (11th Cir.1984).

Once the government demonstrated probable cause, the burden of proof shifted to Ghitis. *See* 21 U.S.C.

(Footnote 19 Continued)

In *United States v. $13,000 in United States Currency*, 733 F.2d 581 (8th Cir.1984), the forfeited money was found in the shoulder bag of a person who previously had been charged with conspiracy to distribute cocaine, but had been released on bond. Also found in the shoulder bag were plastic bags, tape, and rubber bands. The seizure was made at the Minneapolis airport, where the person, using an assumed name, was about to board an airplane for New York. The person also had placed several toll calls to the same apartment in New York that he had called just prior to his arrest on the cocaine conspiracy charge. From this circumstantial evidence, and in the absence of any direct evidence of narcotics, the Eighth Circuit concluded that the person "intended to travel to New York to furnish the $13,000 in exchange for a controlled substance." *Id.* at 585.

§ 881(d);[20] 19 U.S.C. § 1615;[21] *United States v. $364,960 in United States Currency*, 661 F.2d at 322 n. 10. It was Ghitis' burden to establish, by a preponderance of the evidence, that the money had not been used in violation of the statute. *See United States v. $22,287, United States Currency*, 709 F.2d 442, 446 (6th Cir.1983); *cf. United States v. One 1975 Ford F100 Pickup Truck*, 558 F.2d 755, 756 (5th Cir.1977) (discussing 49 U.S.C. § 782 and 19 U.S.C. § 1595a, two analogous forfeiture statutes). Ghitis' evidence on this issue primarily consisted of testimony relating to Colombian currency laws and coffee shortages. The district court found this evidence unpersuasive, and so do we. We therefore hold that the district court did not err in ruling that a "substantial

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[20]21 U.S.C. § 881(d) provides, in pertinent part:

> (d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws . . . shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this sub-chapter, insofar as applicable and not inconsistent with the provisions hereof. . . .

[21]19 U.S.C. § 1615 provides, in pertinent part:

> In all suits or actions (other than those arising under section 1592 of this title) brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimants. . . . *Provided*, that probable cause shall be first shown for the institution of such suit or action, to be judged of by the court. . . .

connection" existed between the forfeited money and narcotics transactions.[22]

B. Did the Forfeited Money Constitute the "Proceeds" of Narcotics Transactions?

Ghitis' next argument is that the forfeited money did not constitute the "proceeds" of narcotics transactions, in that the money had been exchanged for goods of equivalent value, *i.e.*, pesos. According to Ghitis, even assuming that the "sellers" of United States dollars to SONAL were drug dealers, the government should have attempted to find and seize the pesos that ended up in the hands of the drug dealers. Having failed to do so, Ghitis argues, the government could not seize the dollars acquired by SONAL in value-for-value exchanges.

We find this argument meritless. The statute authorizes the forfeiture of "all proceeds traceable to [a narcotics] exchange," 21 U.S.C. § 881(a)(6), and does not limit forfeiture to property found in the hands of a drug dealer. Were the statute so limited, Congress hardly would have found it necessary to include the so-called "innocent owner" defense discussed *infra*, at

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[22]Ghitis argues that he satisfied his burden of proving a legitimate source for the money by demonstrating that most of it came from Carlos Molina, who ran a "reasonably reputable" money exchange house. We do not agree. That Ghitis may not have received the money *directly* from drug dealers does *not* prove that the money was free from a substantial drug connection.

section II.C. of this opinion. In addition, the legislative history of 21 U.S.C. § 881(a)(6) provides:

> [I]f such proceeds were, for example, commingled with other assets, *involved in intervening legitimate transactions*, or otherwise changed in form: they would still be subject to forfeiture.
>
> . . .

Joint Explanatory Statement of Titles II and III of the Pyschotropic Substances Act of 1978, Pub.L. No. 95-633, 92 Stat. 3768 (codified in scattered sections of 18 and 21 U.S.C.), *reprinted in* 1978 U.S. Code Cong. & Ad.News 9518, 9522 (emphasis added). Congress clearly contemplated the forfeiture of property that once belonged to drug dealers, but subsequently was transferred via "legitimate transactions," to third parties.

Ghitis contends that, as a result of the district court's ruling in this case, every value-for-value exchange involving the "proceeds" of narcotics transactions will multiply the total amount of money forfeitable to the government under 21 U.S.C. § 881(a)(6). For example, Ghitis poses in his brief on appeal the following hypothetical:

> A drug dealer has a drug-generated $100 bill. He asks a cohort to exchange the $100 bill for five $20 bills. According to the government's argument, both the $100 bill in the cohort's hands and the five $20 bills in the dealer's hands are "proceeds" subject to forfeiture. Although only $100 was drug-generated, $200 are now forfeitable. If the cohort goes to a second cohort and changes the $100 bill for

> ten $10 bills, $300 is now forfeitable—the five $20 bills in the dealer's hands, the ten $10 bills in the first cohort's hands, and the $100 bill in the second cohort's hands.

We perceive no problem with the hypothetical posed by Ghitis. In our view, those who knowingly do business with drug dealers do so at their own risk. Ghitis' proposed interpretation of 21 U.S.C. § 881(a)(6) would completely insulate money-launderers, and others who knowingly do business with drug dealers, from possible forfeiture of their ill-gotten gains. We reject such an unduly restrictive interpretation of the statute, and hold that the forfeited money here constituted the "proceeds" of narcotics transactions.[23]

C. Did Ghitis Have Knowledge of Narcotics Transactions?

Ghitis' final claim is that he had no knowledge of the connection between the forfeited money and narcotics transactions, and thus was entitled to assert the so-called "innocent owner" defense contained in 21 U.S.C. § 881(a)(6). The statute provides that "no property shall be forfeited . . . to the extent of the interest of an owner,

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[23]Even if we agreed with Ghitis' interpretation of the statute, we would not reverse the decision of the court below. We find no evidence in the record indicating that Ghitis, or SONAL, gave pesos in exchange for the forfeited money prior to the seizure of the money by the government. Rather, the record supports an inference that significant time normally elapsed between the deposit of dollars in the SONAL account and the transfer of pesos, or, alternatively, the cashing of checks drawn on the account, in exchange for those dollars.

by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *Id.* According to Ghitis, the district court erroneously rejected his "innocent owner" defense on the grounds that he "knew or reasonably should have known" that the money being deposited in the SONAL account was drug-generated.

We agree with Ghitis that the application of the statutory "innocent owner" defense turns on the claimant's actual knowledge, not constructive knowledge.[24] Nevertheless, we reject Ghitis' "innocent owner" claim

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[24]The government argues that we should replace the "actual knowledge" standard with the "negligence" standard discussed by the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 633, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). In *Calero-Toledo*, the Court addressed a due process challenge to a forfeiture, under a Puerto Rico statute, of property belonging to an alleged "innocent owner." The Court upheld the forfeiture, but stated in dicta that "[i]t . . . has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done *all that reasonably could be expected* to prevent the proscribed use of his property. . . . " *Id.* at 689, 94 S.Ct. at 2094-95 (emphasis added).

Because *Calero-Toledo* did not involve the statutory "innocent owner" defense contained in 21 U.S.C. § 881(a)(6), we question the government's invocation of the *Calero-Toledo* dicta in this case. Nevertheless, because we find that Ghitis failed to meet the "actual knowledge" standard, we leave for another day the question of the applicability of the *Calero-Toledo* dicta to forfeiture actions under 21 U.S.C. § 881(a)(6). *See United States v. $47,875 in United States Currency*, 746 F.2d 291, 292 n.1 (5th Cir.1984).

for two reasons. First, we do not read the district court's decision the same way that Ghitis does. Although the district court twice opined that Ghitis "should have known" that the money was drug-generated, the court also found that Ghitis' action "indicated a tacit acknowledgement of his disquieting belief that these large cash deposits were coming to the SONAL depositor (Eisenstein) by way of Colombian couriers carrying narcotic-generated cash," and that Ghitis had a "gnawing belief that the funds being dealt with were tainted." Furthermore, in explaining the standard of law to be applied to this issue, the court stated:

> Thus, the claimant Ghitis . . . could bring about the dissolution of the seizure even if the government succeeds in establishing probable cause in the view of the fact finder by showing that SONAL *had no knowledge and had given no consent* to improper acts or omissions. . . . Where it is reasonable to believe that an owner of property is *aware* that the property is the proceeds of narcotics transactions or involved in the narcotics exchange business, that owner is not an innocent owner.

551 F.Supp. at 323 (emphasis added). Therefore, contrary to Ghitis' assertion, we conclude that the district court properly applied the "actual knowledge" standard, and found sufficient evidence to support an inference that Ghitis had actual knowledge of the drug taint.[25]

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[25]We therefore reject Ghitis' contention that the district court's decision jeopardizes the status of cash as "legal tender." On the

Second, and more importantly, Ghitis' argument ignores the statutory requirement that the claimant, and not the government, bear the burden of proof on the "innocent owner" defense. Under 21 U.S.C. § 881(a)(6), the government need not prove, and the district court need not find, that the claimant *had* actual knowledge. Rather, it is the claimant's responsibility to prove the *absence* of actual knowledge. Whatever the district court may have found concerning Ghitis' state of knowledge in this case, the court certainly did not find the absence of knowledge essential to Ghitis' "innocent owner" defense. On the contrary, the court found that "SONAL and Ghitis have failed to establish that they are innocent owners of either of the currencies." 551 F.Supp. at 323. Consequently, we decline Ghitis' invitation to reverse the district court on this ground.

D. Did the Check Holders Have Standing to Contest the Forfeiture of the Funds on Deposit in the SONAL Account?

The sole remaining issue on appeal is whether the district court erred in entering summary judgment

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(Footnote 25 Continued)
contrary, we interpret the district court's decision as affecting only those who *knowingly* engage in business with drug dealers.

Like the district court, we find ample evidence in the record to support an inference that Ghitis knew about the drug taint. Perhaps the best evidence consists of Ghitis' own words and deeds; Ghitis' comments to Pozo and Holtz, his request for a loan to "protect" the funds on deposit in the SONAL account, and his refusal to enter the United States without a guarantee of immunity, all indicate that Ghitis entertained more than a mere suspicion that the money SONAL was receiving was drug-generated.

based on lack of standing against numerous claimants holding checks written on the forfeited SONAL bank account. To have standing to contest a forfeiture under 21 U.S.C. § 881(a)(6), a claimant must demonstrate "an ownership or possessory interest in the property seized." *United States v. $500,000*, 730 F.2d 1437, 1439 (11th Cir.1984).[26] The check holders' argument is based on the proposition that, under Florida law, a check is an equitable assignment of the funds on deposit in a bank account. The cases cited in support of this proposition, however, either do not involve checks or predate Florida's enactment of the Uniform Commercial Code. Under the Uniform Commercial Code, it is clear that a check does not operate as an assignment of funds. *See* Fla.Stat.Ann. § 673.409(1) ("A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it."). The Comment to this Code section emphasizes that "a check or other draft does not of itself operate as an assignment *in law or equity*." U.C.C. § 3-409 Comment (emphasis added).

Because the SONAL checks, under Florida law, represented neither a legal nor an equitable assignment

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[26]The claimants here argue that an ownership or possessory interest in the property is not required, but that, according to the legislative history of the statute, a mere equitable interest will suffice. Whatever the merits of this argument, we are bound by this court's prior decision in *United States v. $500,000*. In any event, as our discussion in the text makes clear, the claimants in this case cannot prevail under either standard.

of the funds on deposit in the account, we hold that the district court properly entered summary judgment against the check holders.[27]

III. CONCLUSION

On the basis of the foregoing discussion, the judgment of the court below is hereby **AFFIRMED.**

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[27]Claimant Raymond Takiff, who served as Beno Ghitis' attorney in the district court, cites *United States v. Currency Totalling $48,318.08*, 609 F.2d 210 (5th Cir. 1980), in support of his contention that an assignment of funds to an attorney in exchange for present and future services can provide standing to contest a forfeiture. Because Takiff's "assignment" consisted of a SONAL check, however, his claim must fail for the same reasons as those of the other check holders.